IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.118/84

1178

BETWEEN: THE POLICE

Appellant

AND: L E
of Auckland, Beneficiary

Respondent

Hearing: 22 May 1984

Judgment: 13 July 1984

Counsel: Miss Shaw for appellant
R P Chambers for respondent

JUDGMENT OF VAUTIER, J.

Although the Notice of Appeal given on behalf of the Police in this case referred only as a ground of appeal to the sentence imposed in the District Court being "manifestly inadequate", it emerged at the hearing of the appeal in this Court that a much wider question was involved, that being whether in the circumstances the District Court Judge had, in law, any jurisdiction to sentence the respondent.

This question was therefore fully argued before me, and it was necessary to reserve my decision and give close consideration to the arguments advanced, particularly in view of the fact that it was contended on behalf of the appellant that I should adopt a different conclusion on this question of jurisdiction from that only recently arrived at by another Judge of this Court.

The facts giving rise to the appeal are as follows: The respondent appeared in the District Court at Auckland in respect of three charges of incest. The charges related to his three daughters aged, at the commencement date of the periods referred to in the respective informations, 11, 10 and 9. An order was made pursuant to s.47A(2)(b) of the Criminal Justice Act 1954 for psychiatric examination of the respondent. The specialist psychiatrist who furnished the report following such examination expressed the view that the respondent was an emotionally inadequate man but fully responsible in law for his actions. The summary of facts as presented by the police after pleas of guilty had been tendered by the respondent on 28 November, 1983, showed the conduct referred to in the informations extended as a regular practice over a period of four years in respect of the eldest girl and two years or possibly up to three in the case of the second girl and one year in respect of the youngest.

The District Court Judge, following the pleas of guilty, remanded the respondent to appear again in the District Court with a probation report to be obtained in the meantime. On 13 December he convicted the respondent on each of the charges and sentenced him to 12 months imprisonment on each charge to be followed by 12 months on probation with a number of special conditions imposed. The sentences were directed to be served concurrently.

The bringing of an appeal against this sentence has been consented to by the Solicitor-General as required by s.115A of the Summary Proceedings Act 1957, as inserted

by s.5 of the Summary Proceedings Amendment Act 1969.

The offence of incest as defined by s.130 of the Crimes Act 1961 is one of the class of offences comprised in the First Schedule to the Summary Proceedings Act 1957 ("the Act") which, although they are indictable offences, may be tried summarily by District Court Judges as provided by s.6(1) of the Act. The precise wording of that provision is important here as I will later mention.

In this case the prosecutor took the course of laying the charges indictably. In each case the information sworn is headed:

INFORMATION

WHERE DEFENDANT IS TO BE PROCEEDED AGAINST

INDICTABLY

(The word "indictably" appears in place of the word "summarily" on the form as printed, this word being deleted).

The information, following the particulars of the charge, concludes "being an offence punishable indictably". Again the printed word "summarily" is deleted.

It should here be mentioned that the form of information prescribed under s.145(2) of the Summary Proceedings Act 1957 (which I will hereafter refer to as "the Act") has in the heading the words "by indictment" not "indictably" and concludes with the words "being an

indictable offence" and not "being an offence punishable indictably". There can be no doubt, however, that the information was intended to be an information laid in terms of s.145 of the Act.

The respondent was able to enter a plea of guilty on 28 November 1983 to the offences with which he was so charged, without waiting for a preliminary hearing under Part V of the Act, because of the new procedural provision introduced by s.153A of the Act (as inserted by the Summary Proceedings Amendment Act 1976, s.15(1)). That section must later be examined in detail for the purposes of this judgment. Before I do that it is, however, I think necessary, as Mrs Shaw submitted, to consider the whole scheme of the Act in relation to matters of procedure and jurisdiction as regards particular offences under the Crimes Act 1961.

First, it must be noted that Part I of the Act is given the subject-heading "Criminal Jurisdiction of District Court". The word "Court" when used in the Act means "a District Court constituted under the District Courts Act 1947" (s.2). There is reference, first, in s.4 and s.5 of Part I, to such Courts differently constituted being able to exercise three forms of criminal jurisdiction - (1) summary criminal jurisdiction; (2) jurisdiction to conduct the preliminary hearing of any indictable offence; and (3) jurisdiction to conduct any proceedings under s.153A of the Act.

"Indictable offence" is defined in s.2 simply as "an offence for which the defendant may be proceeded

against on indictment" but it is to be particularly noted that it is further provided that an offence is not to be deemed an indictable offence solely because of the fact that under s.66 of the Act the defendant could elect to be tried by jury.

There then follows the section to which I earlier referred - s.6, dealing with summary jurisdiction in respect of indictable offences, i.e. the fourth form of criminal jurisdiction conferred upon District Courts. Subsection (1) of that section provides as follows:

> "Summary jurisdiction in respect of indictable offences - (1) A Court presided over by a District Court Judge shall have summary jurisdiction in respect of indictable offences described in the enactments specified in the First Schedule of this Act, and proceedings in respect of any such offence may accordingly be taken in a summary way in accordance with this Act."

I emphasise the words "proceedings in respect of any such offence may accordingly be taken in a summary way in accordance with this Act."

Subsection (2) makes similar provision with regard to certain other prescribed indictable offences again, however, using the words I have emphasised.

Under s.7 where a person is summarily convicted of an offence mentioned in s.6 the Court may sentence him to imprisonment for a term not exceeding three years or a fine not exceeding $4,000 or to both. There are limitations imposed which are not material for present purposes.

There is then s.8(1) which, so far as is material here and quoting it with the amendments made by s.4(1)(a) of the Summary Proceedings Amendment Act 1961 and s.6 of the 1980 Amendment Act, reads as follows:

> "Other jurisdictions and powers not affected - (1) Nothing in this Part of this Act shall limit in any way -
>
> (a) The right to proceed against any person under Part V of this Act or under subsection (3) of section 345 of the Crimes Act 1961;
>
> (b) The jurisdiction and powers of any District Court under Part V of the Act where any charge is made against any person under that Part;
>
> (c) The jurisdiction and powers of the High Court or a District Court in relation to any indictable offence or in relation to any offence in respect of which the accused elects to be tried by a jury or in relation to an offence that a District Court declines to deal with summarily under Part II of this Act;
>
> (d) The jurisdiction and powers of any District Court in respect of any indictable offence for which the offender may be tried in a summary way independently of this Part of this Act;
>
> (e) ... "

It is to be noted that the subsection in (c) thus differentiates between and deals separately with three separate categories of offence, being:

(1) Indictable offences.

(2) Offences in respect of which an accused person has a right to elect trial by jury (s.66).

(3) Offences in respect of which a District Court declines to deal with summarily under Part II of the Act (s.44).

It is also to be particularly noted that s.8(1)(a) specifically provides that nothing in Part I of the Act, the part directed to defining the jurisdiction of District Courts, is to affect the right to proceed against any person under Part V.

Part II of the Act then deals with all the details of procedure applicable where a defendant is proceeded against summarily. The defendant may, under this Part of the Act, appear before the Court in various ways one of which is pursuant to a summons issued on the basis of an information laid in terms of s.13 which, by virtue of s.15, must be in the form prescribed, i.e. Form 1 of the Second Schedule which employs the wording of the form used here without the deletions to which I have referred. Section 11, it is to be noted, specifically provides that Part II of the Act is to apply to all proceedings where the defendant is proceeded against summarily. Section 44, it is to be further noted, is in this Part II and that is the section whereunder a District Court may decline to deal summarily with an offence and instead commit to the High Court for sentence. It is applicable only to "any summary prosecution of an indictable offence." Under s.44(2)(b) if the District Court declines summary jurisdiction and the defendant has not then been convicted or has not pleaded guilty, the District Court is required to deal with the case in all respects as if the offence was an indictable offence not punishable summarily. Section 44 thus provides the detailed machinery provisions for the third of the three categories for which s.8 quoted above makes provision.

Then, still in Part II, there is s.66 dealing with the second category, i.e. those where the right of election is exercised. It is here important, I think, to note that subsection (4) of s.66 reads as follows:

> "Where a defendant who is charged under this Part of this Act with an indictable offence elects under this section to be tried by a jury, the proceedings shall continue as if he had been charged on an information in form 2 in the Second Schedule to this Act."

It thus specifically preserves the clear procedural distinction created under the Act between cases where the defendant is proceeded against summarily, that is to say if on information then by an information following Form 1, and proceedings where the defendant has been proceeded against indictably as it is said - that is, by means of an information in accordance with Form 2.

When one then comes to Part V of the Act this is found to contain the provisions which deal with the second and third classes of case to which I referred at the outset in which criminal jurisdiction is conferred upon District Courts by s.5 of Part I of the Act, i.e. jurisdiction to deal with the preliminary hearings of indictable offences and jurisdiction to deal in the manner there laid down with indictable offences in respect of which the defendant before or during the preliminary hearing elects or asks to be permitted to plead guilty. The precise limits of this third category of criminal jurisdiction are set forth in subsection (6) of s.153A (as substituted therein by s.10 of the Summary Proceedings Amendment Act 1980).

The section in question it should be noted is given a separate subject heading "Plea of guilty before or during preliminary hearing" and this follows the format of the other subject headings dealing with the various stages of the procedure for preliminary hearing of indictable offences.

It is desirable to quote all the relevant parts of s.153A being subsections (1), (2), (4), (6), (7) and (8).

> "Defendant may plead guilty before or during preliminary hearing - (1) If a defendant is represented by a barrister or solicitor and the offence with which he is charged is not punishable by death, he may, at any time before or during the preliminary hearing of any information, request that he be brought before the Court (or if he is at that time before the Court, that he be permitted) to plead guilty to the offence with which he is charged.
>
> (2) As soon as practicable after such request (which shall be in writing if made before the commencement of the preliminary hearing), the defendant shall be brought before the Court to be dealt with (or if he is before the Court at the time of such request, shall be dealt with) under this section.
>
> (3) ...
>
> (4) On the defendant's (or, where the defendant is a corporation, the defendant's representative's) attendance before a Court for the purposes of this section, the charge to which he is required to plead shall be read to him and he shall then be called upon to plead either guilty or not guilty.
>
> (5) ...
>
> (6) If the defendant pleads guilty, then subject to section 66(6) of this Act and section 39D of the Criminal Justice Act 1954, the Court shall -
>
> (a) Where the offence is an indictable one triable summarily or where the defendant elected under section 66 of this Act to be tried by a jury, record the plea and

adjourn the proceedings for the sentencing of the defendant in accordance with section 38F of the District Courts Act 1947, and section 47 of this Act shall apply on every such adjournment; or

(b) In any other case, commit the defendant to the High Court for sentence.

(6A) ...

(7) Where the defendant pleads guilty and is committed to the High Court for sentence pursuant to this section, sections 168 (except subsection (1)), 169, 170, and 171 (except subsections (1) and (1A) of this Act, as far as they are applicable and with the necessary modifications, shall apply as if the defendant had pleaded guilty and been committed to the High Court for sentence at the close of a preliminary hearing.

(8) Sections 155, 156 and 157 of this Act, as far as they are applicable and with the necessary modifications shall apply with respect of any proceedings under this section, as if references in those sections to the preliminary hearing were references to proceedings under this section."

Section 66(6) referred to in subsection (6) has reference only to withdrawal of an election under that section and s.39D of the Criminal Justice Act refers only to the matter of substitution of a plea of not guilty in cases of questionable sanity. The sections referred to in subsections (7) and (8) relate only to certain ancillary procedural powers.

I turn aside here for a moment to draw attention to the fact that there does not here seem to have been any compliance with the requirement of s.153A(2). No preliminary hearing having commenced a request in writing for the defendant was necessary before the procedure under the section could be invoked.

Ongley J., in the decision to which I referred at the outset of this judgment, this being R v Riley & Oden (M.12/83 Palmerston North Registry, judgment 25 February 1983), came to the conclusion that the words "the offence is an indictable one, triable summarily" appearing in s.153A (6) embrace cases where the defendant has been charged indictably, that is, on an information in accordance with Form 2 before-mentioned, so long as the offence is one of those indictable ofences which may be dealt with summarily, as provided for by s.6.

Counsel for the appellant contended that this is not so, and that such cases do not come within subsection (6)(a) and must be dealt with in terms of subsection (6)(b), that is, by the defendant committed for sentence to this Court. She adverted to the various provisions which I have set forth showing, it was submitted, the clearly-defined scheme of the Act as a whole whereunder there is provided a completely separate procedure under Part II for indictable offences triable summarily and founded upon informations laid as specifically required by the statute, in accordance with Form 1 in the First Schedule, and indictable offences which, although as regards the particular offence they could be in some cases the subject of the summary trial procedure, are in fact charged on informations laid indictably, in accordance with Form 2.

In reaching the conclusion he did, Ongley, J. dealt quite briefly with the point. The reasoning he followed is set forth on p.4 of this judgment :

> "Mr McKegg, for the Crown, submitted that an offence cannot be described as an offence triable summarily if it is laid in such a way as to preclude summary trial. On the face of it that is a commonsense proposition but I find it difficult to reconcile with the rest of the section. On indictable offences triable summarily which are charged summarily an election under Section 66 of the Summary Proceedings Act is required before the person charged is entitled to be tried by a jury. That situation is separately covered by subsection (6)(a) which would reduce the first part of the subsection to surplusage unless the first part relates to a different category of offences. I think that the intention of the legislation is clear. An indictable offence triable summarily within the meaning of the words as used in subsection (6)(a) connotes an offence of that general category which is laid indictably."

The matter had come before him on an appeal by way of case stated, the question being whether s.153A(6)(a) applied in the same circumstances as those I am here considering. It is of some importance, I think, to note that there was a further question in the case, viz., as to whether assuming the answer to the first question was "yes" the words "any Judge" in s.28F(2) of the District Courts Act 1947 (as enacted by the District Courts Amendment Act 1980) include a Judge of the District Court not being a "trial Judge" appointed pursuant to s.38B. This question was also answered in the affirmative.

Section 28F(2) referred to reads as follows:

> "Where the accused person pleads guilty under section 153A or section 168 of the Summary Proceedings Act 1957 in respect of an offence to which section 28A of this Act applies and the Court accepts jurisdiction, any Judge may sentence the person to imprisonment or a fine or both, not exceeding the maximum term or amount prescribed by section 7 of the Summary Proceedings Act 1957."

The result, it will be seen, if the foregoing represents the correct interpretation of the legislation, is that a prosecutor seeking to prosecute for any of the offences referred to in s.6 of the Act including offences such as the present for which the Legislature has prescribed a maximum term of imprisonment of 10 years may be forced to accept the situation in however serious a category the particular circumstances bring the offence that a term of imprisonment of three years only may have to be accepted as the maximum level of the punishment to be imposed. That may, of course, have been the intention of the Legislature and I am not concerned here with that aspect but solely with the proper interpretation of s.153A(6). I draw attention to it simply to emphasise that the question here arising has a good deal of importance.

I have naturally been inclined towards accepting the view of my brother Judge. The point is, however, not in my view susceptible to any immediate and confident answer simply by reading the section itself. With very great respect to the reasoning adopted by Ongley, J. I have concluded that the proper interpretation of the provision cannot be arrived at simply by an analysis of the wording of the subsection itself in the way which he has done but must be sought, as counsel has submitted, from a consideration of the various other provisions and the general procedural scheme of the Act.

When this is done there is in my view no real difficulty as is suggested in reconciling the different

parts of subsection (6)(a). As I have illustrated the consistent approach of the draftsman has been to distinguish between three types of offence - viz., indictable offences triable summarily, offences in respect of which a defendant is entitled to trial by jury because of the possible penalty being more than three months imprisonment and ordinary indictable offences the preliminary hearings of which are to be dealt with in District Courts. The second category, of course, may embrace many offences within the first but it must nevertheless be preserved as a different category because, of course, many offences with a penalty of more than three months imprisonment are not indictable offences at all. The Court of Appeal was concerned with one such in R. v. Matich [1973] 2 NZLR 600 where Reg. 18(8) of Civil Regulations 1953 providing for a penalty of up to six months imprisonment "on summary conviction" was being considered. It was clearly necessary for s.153A(6)(a) to deal separately with the second category of cases, i.e. those where the defendant had elected trial under the general right so to elect and was thus facing a preliminary hearing. I regret that I do not find myself able to agree that there is any significance, in the way mentioned therefore, in the fact that indictable offences triable summarily are mentioned separately. That simply follows the consistent pattern elsewhere evidenced in the Act. In subsection (1) of s.153A the broad words "preliminary hearing of any information" were necessary, of course, because a preliminary hearing is required where a person charged on an information in Form 1 elects trial by jury. Bearing in mind that these are all procedural provisions the underlying

intention in my view of s.153A (6) is clear. That intention is, in my view, to provide for the completion in the District Court of those matters which, under the legislation as it stands, if they proceed to a hearing will be disposed of completely in a District Court leaving with this Court the disposal of matters which, if they proceeded in the ordinary way, would be finally disposed of in this Court. As was pointed out, s.162(2) prohibits the amending of any information in Form 2 of the Second Schedule to an information in Form 1. In Adams: Criminal Law and Practice in New Zealand, (2nd edn) para.2383 reads :

> "Proceedings in respect of an indictable offence intended to be prosecuted on indictment are commenced by an information in Form 2 (Summary Proceedings Act, Second Schedule), and the proceedings in the Magistrates' Court are by way of preliminary hearing under Summary Proceedings Act, Part V, and, if the evidence is sufficient, lead to committal to the Supreme Court for trial or sentence as the case may require. An information in Form 2 cannot be amended to an information in Form 1 (Summary Proceedings Act, 162), with the result that, if the prosecutor insists on proceeding in this way, there can be no summary trial."

Once an alleged offence has been made the subject of an information which has been laid indictably, I cannot see how it can thus ever be converted into an indictable offence triable summarily, and thus fall within the words used in s.153A (6)(a). One comes back to the words of s.6 conferring the jurisdiction on District Courts regarding indictable offences, remembering of course that those Courts have no jurisdiction at all which is not expressly conferred upon them by statute. That section shows that the only way in which it is provided that District Courts may exercise the limited jurisdiction

conferred upon them regarding specified indictable offences is where "proceedings in respect of such offence" are taken "in a summary way in accordance with this Act". That way is, of course, on an information following Form 1.

I pause here to say that I have not overlooked that the information here as now customarily employed where informations are intended to be laid indictably does not follow precisely the wording and format of Form 2. I treat this as of no significance. The intention to proceed on indictment and not summarily is completely clear and s.204 of the Act would obviously, I think, provide the answer to any question raised on this ground. Counsel for the respondent did not seek to rely here on any thus aspect in any way.

It is accordingly my conclusion that s.153A(6)(a) could not be invoked or applied in this case and that the District Court Judge accordingly had no jurisdiction to impose sentence on the respondent and I, with regret, am thus unable to adopt and follow the decision already arrived at by another Judge of this Court. That will create an inconvenient situation and it is to be hoped that an early opportunity will arise for the matter to be considered by the Court of Appeal.

It next becomes necessary in view of the conclusion thus reached that I should decide how this appeal against sentence should be dealt with. In terms of s.121 of the Summary Proceedings Act 1957 this Court, in a case where the sentence is found to be one which the Court imposing it had

no jurisdiction to impose or is one which is clearly excessive or inadequate or inappropriate, the Court may quash the sentence and may pass such other sentence as is warranted in law in substitution therefor as is thought ought to have been passed. Both the situations referred to apply here in my view. I appreciate that it is established by the decisions of the Court of Appeal in R. v. Wihapi [1976] 1 NZLR 422 that while a Court, on appeal, is free to decrease a sentence which appears to it is manifestly excessive, such a Court will require the considerations justifying an increase to speak more powerfully than those which ordinarily might justify a reduction (see per McCarthy, P. at p.424). This, however, was in my view clearly a very serious case of incest. The sentence, it is to be noted, was imposed just before the decision of the Court of Appeal in R. v. Banbury (unreported) CA 186/83, judgment 16 December, 1983 became available. I have for the purposes of this case considered not only the judgment in that case and the English decisions therein referred to, but also the remarks made by Chilwell, J. when imposing sentence in a recent case, R. v. R. S.25/84 Auckland Registry, sentence 18 May, 1984, involving facts similar in several respects to those of the present case. Like Chilwell, J., I am struck by the fact that the decisions of the Court of Criminal Appeal in England to which reference is made in R. v. Banbury (supra) appear to indicate a strangely lenient view on the question of sexual abuse and corruption of children. I have taken particular note of the fact that in none of the decisions in England which were cited is there any reference at all to the question of the adverse emotional and psychological effects in later life

likely to manifest themselves where young children have been subjected to this kind of abuse. Counsel for the appellant made reference to the frequency with which there is encountered in probation reports reference to the offender having been subjected to conduct of this kind in his or her youth. That, I am aware, is true. The Courts cannot in my view shut their eyes to the growing awareness in the community of the psychological damage occasioned as a result of childhood sexual corruption. The frequent inability of people who have such a background to themselves achieve satisfactory sexual relations in their adulthood is now too well publicised and documented for this to be ignored. Such things can, of course, have dire emotional ill effects. It may well be, as is said in some of the judgments referred to, that imprisonment is unlikely to have any substantial deterrent effect as regards the offender himself or herself. Quoting from the judgment of R. v. Banbury (supra), however, it is clearly necessary nevertheless that a sentence should be imposed which is "heavy enough to mark society's concern and rejection of this sort of conduct."

After considering a number of reported cases I am constrained to conclude that a sentence of 12 months imprisonment followed by 12 months probation for this case was indeed, as is submitted on behalf of the appellant, completely inadequate and so far below the level of a proper sentence that this Court should not allow it to stand. In R. v. Banbury (supra) reference was made in relation to the "very bad cases" for which very long sentences should be reserved to the situation of repeated incest. This, of course, is just such

a case. The period covered by all three offences is four years with each child in turn subverted by the parent to whom she should have been able to look for protection, as soon as she attained the age of 10 years. The eldest child was introduced into contraceptives to prevent her from becoming pregnant. The respondent was, at the time of sentencing, years of age and had had the children in his care over the previous six years following his separation from his wife. That created a situation in which they were specially dependent upon his protection.

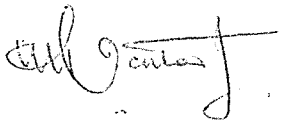
The report obtained concerning him from the psychiatric specialist provided, as I have mentioned, no indication of mental disease and the comment is made by the specialist that about as much as can be said in mitigation - "if this does constitute mitigation" - is that it is probably true to say that the respondent did not realise he was psychologically harming the girls and did his best to protect them from exposure to pregnancy. There is the factor of him at one stage endeavouring to seek help on occasions in respect of the situation he was in and the habits he had developed. One would have thought, however, that these would at least have brought home to him the grave seriousness of his conduct.

The comment is made in the probation report that he appeared to others to be doing quite well with the bringing up of the children unaided.

It should certainly be taken into account that this is not one of those cases where children have been subjected to sexual perversions as well as intercourse. I also take into account that the respondent is entitled to some credit for his plea of guilty. Bearing in mind the fact that three children were successively involved over the very long periods referred to in the charges, it appears to me that the minimum sentence which should properly be imposed is 4 years imprisonment.

The sentence of 12 months imprisonment followed by Probation as imposed in the District Court is accordingly quashed, both on the grounds of its inadequacy and on the grounds that the Judge had no jurisdiction to impose sentence, and in substitution therefor the respondent is sentenced to 4 years imprisonment - that, hwoever, to be deemed to have commenced on 12 December last.

There will be a permanent order for suppression of publication of the name of the respondent.



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